

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DOUGLAS SHEPHERD,
ALAN G. and DELORES N. BARTEL, L.P.
and
1400 HAMPTON BLVD., L.L.C.,

Plaintiffs,

vs.

CIVIL ACTION NO. 2:10cv343

NATIONWIDE MUTUAL
INSURANCE COMPANY
and
1400 HAMPTON BOULEVARD
CONDOMINIUM ASSOCIATION, INC.,

Defendants.

BRIEF IN OPPOSITION TO MOTION TO CONSOLIDATE

Plaintiffs Douglas Shepherd, Alan G. and Delores N. Bartel, L.P., and 1400 Hampton Blvd., L.L.C. submit this brief in opposition to Defendant Nationwide's Motion to Consolidate Cases.

On October 7, 2008, 1400 Hampton Boulevard Condominium Association, Inc. (the "Association") filed a Complaint in the Circuit Court for the City of Norfolk, Virginia, against 1400 Hampton Blvd., L.L.C., Douglas Shepherd, and Alan G. and Delores N. Bartel, L.P. ("Nationwide insureds"). This is the Underlying Action.

1400 Hampton Boulevard, L.L.C. is the named insured on a contract of insurance issued in Virginia by Nationwide Mutual Insurance Company ("Nationwide"), which also provides coverage to Douglas Shepherd and Alan G. and Delores N. Bartel, L.P., both Virginia citizens. The Plaintiffs filed this action for declaratory judgment under Virginia

Code § 8.01-184 in the Circuit Court of the City of Norfolk, Virginia on or about June 18, 2010. The Plaintiffs are seeking a declaration that the Nationwide policy provides liability coverage and a duty to defend to the Plaintiffs with regard to the Underlying Action. This action only involves issues arising under state law.

On July 15, 2010, Defendant Nationwide filed a Notice of Removal under 28 U.S.C. § 1446 (a). Defendant Nationwide claims that this Honorable Court has jurisdiction over this matter based on diversity of citizenship. Complete diversity is not present, however, in that Plaintiffs and Defendant Association are all citizens of Virginia. In order to create diversity, Nationwide filed a Motion to Realign the parties on July 28, 2010. The Defendants have filed Motions to Remand this matter back to state court.

Nationwide filed its own declaratory judgment action to determine coverage on June 25, 2010. That case is currently pending in this Honorable Court as Nationwide Mutual Insurance Company v. Douglas Shepherd, Alan G. and Delores N. Bartel, L.P., 1400 Hampton Blvd, LLC, and 1400 Hampton Boulevard Condominium Association, Inc., 2:10cv00310. These Plaintiffs, as Defendants in 2:10cv310, moved to dismiss that action on July 15, 2010, on the grounds that the Court should abstain from exercising its discretionary jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the four-factor test set out in *Great American Ins. Co. v. Gross*, 468 F. 3d 199, 211 (4th Cir. 2006).

Nationwide filed this Motion to Consolidate the two declaratory judgment actions on July 28, 2010.

**THE COURT NEED NOT RULE ON NATIONWIDE'S MOTION TO
CONSOLIDATE**

The Plaintiffs urge the Court that consideration of Nationwide's Motion to Consolidate is unnecessary. The Court's jurisdiction over this matter is discretionary. As the Court should abstain from exercising jurisdiction over this case, this case should be remanded to state court. See Plaintiffs' Motion to Remand and Memorandum in Support. Rule 42(a) of the Federal Rules of Civil Procedure requires that before a motion to consolidate can be granted, both matters must be pending before the court. See Rule 42(a). As the Court should decline to exercise jurisdiction over these cases, the actions will no longer be before the court, and consolidation is no longer possible. See *Womble v. Dixon*, 585 F. Supp. 728, 733 (E.D. Va. 1983).

WHEREFORE, these Plaintiffs respectfully request that the Court deny Defendant Nationwide's Motion to Consolidate.

1400 HAMPTON BLVD., L.L.C.,
and ALAN G. and DELORES N.
BARTEL, L.P.

By _____ /s/ _____
Of Counsel

Randolph C. DuVall, Esquire
Virginia State Bar Number 17646
Counsel for 1400 Hampton Blvd., L.L.C.,
Douglas Shepherd, and Alan G. and
Delores N. Bagrtel, L.P.
Breedon, Salb, Beasley & DuVall, P.L.C.
555 East Main Street, Suite 1210
Norfolk, Virginia 23510-2234
Phone: 757-622-1111
Fax: 757-622-4049
duvall@breedenlaw.net

Darlene P. Bradberry, Esquire
Virginia State Bar Number 34442
Counsel for 1400 Hampton Blvd., L.L.C.,
Douglas Shepherd, and Alan G. and
Delores N. Bartel, L.P.
Breedon, Salb, Beasley & DuVall, P.L.C.
555 East Main Street, Suite 1210
Norfolk, Virginia 23510-2234
Phone: 757-622-6111
Fax: 757-622-4049
dbradberry@breedenlaw.net

CERTIFICATE OF SERVICE

I certify that on the 11th day of August, 2010, I will electronically file the foregoing with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Wayne F. Cyron, Esquire
James G. Smalley, Esquire
Cyron & Miller, L.L.P.
100 North Pitt Street, Suite 200
Alexandria, Virginia 22314-3134
wcyron@cyronmiller.com
jsmalley@cyronmiller.com
Counsel for Nationwide Mutual Insurance Company

and

John S. Norris, Jr., Esquire
Robert M. Lorey, Esquire
Norris, St. Clair & Lotkin
2840 S. Lynnhaven Road
Virginia Beach, Virginia 23452
jnorris@norrisstclair.com
rlorey@norrisstclair.com
Counsel for 1400 Hampton Boulevard Condominium Association, Inc.

/s/

Darlene P. Bradberry, Esquire
Virginia State Bar Number 34442
Counsel for 1400 Hampton Blvd., L.L.C.,
Douglas Shepherd, and Alan G. and
Delores N. Bartel, L.P.
Breedon, Salb, Beasley & DuVall, P.L.C.
555 East Main Street, Suite 1210
Norfolk, Virginia 23510
Phone: (757) 622-1111
Facsimile: (757) 622-4049
dbradberry@breedenlaw.net